HONGKONG BANK MALAYSIA BHD

v.

MOHAMMED NOOR TAMLIHO

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI J
[ORIGINATING SUMMONS NO: 24-55-98]
18 JANUARY 2002

CIVIL PROCEDURE: *Summary judgment - Setting aside - Plaintiff's counsel attested plaintiff's and defendant's signatures in relevant charge documents - Whether element of conflict of interest existed - Whether "cause to the contrary" established by defendant - Section 256(3) National Land Code - Rule 28(a) Legal Profession (Practice and Etiquette) Rules 1978*

LAND LAW: *Sale of land - Order for - Order perfected - Application to set aside order - Whether court "functus officio" after order perfected*

LEGAL PROFESSION: *Conflict of interest and duty - Plaintiff's counsel attested plaintiff's and defendant's signatures in relevant charge documents - Whether indication of conflict of interest - Whether "cause to the contrary" under s. 256(3) National Land Code established by defendant - Rule 28(a) Legal Profession (Practice and Etiquette) Rules 1978*

The defendant filed the present summons in chambers to set aside an order for sale granted on 14 June 1999 of the defendant's land which had been charged to the plaintiff. The defendant submitted that there was an element of "conflict of interest" in that the counsel who represented the plaintiff and obtained the said order was the same counsel who had attested both the plaintiff's as well as the defendant's signatures in the relevant Form 16A of the National Land Code ('NLC') relating to the said charge.

Held:

[1] It is settled law that an order of sale of charged land is a final order unless appealed against and once it is made, drawn up and perfected, the judge is *functus officio* and therefore has no power to set aside the order of sale. It is only if the order was made based on illegality, then it can be set aside and the doctrine of *functus officio* will not apply. (pp 144 g & 145 g)

[1a] The order of sale in this instance had been made, drawn up, extracted and accordingly perfected. It was made in the presence of both parties. It was not made by default or in the absence of the defendant. There was also no indication from the defendant that the court lacked jurisdiction in granting the said order of sale and thus, the doctrine of *functus officio* did apply. (pp 145 e-f & 149 d)

[2] The solicitor in question was only involved in the attestation of the chargor's and chargee's signatures in Form 16A NLC and nothing more. In encl. 51, *ie*, the affidavit in support of this application, there was nothing to indicate that the defendant would challenge the validity of the charge document in Form 16A NLC. Therefore, there was no possibility that either party in the proceeding would call the said solicitor as witness. (p 147 f, h & i)

[3] Rule 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 states that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact. (p 148 e & f)

[3a] The counsel herein had no personal or pecuniary interest in the attestation of Form 16A NLC. Thus, there was no question of conflict of interest. The defendant had for that reason failed to establish any "cause to the contrary" for the purpose of s. 256(3) of the NLC. The order made on 14 June 1999 was perfectly good in law and cannot be set aside. (p 149 a & d)

[Application dismissed.]

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Bank Bumiputera Malaysia Bhd & Ors [1988] 1 MLJ 33 ***(foll)***

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 ***(foll)***

Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 ***(foll)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 ***(foll)***

Lee Kam Sun v. Ho Say Lin & Anor [1999] 4 CLJ 507 ***(foll)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Mui Bank Bhd v. Cheam Kim Yu (Beh Sai Ming - Intervener) [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 ***(foll)***

Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors [1997] 2 CLJ 58 ***(foll)***

Sykt Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak [1997] 3 CLJ 754 ***(dist)***

Wee Choo Keong v. PP [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346 ***(foll)***

Legislation referred to:

Legal Profession Act 1976, s. 94(3)(n), (o)

Legal Profession (Practice and Etiquette) Rules 1978, r. 28(a)

National Land Code, ss. 25(3), 256(3)

For the plaintiff - AS Vengadeswaran; M/s Sykt Kam Woon Wah
For the defendant - B Murugayah; M/s B Murugayah & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Ramly Ali J:
Enclosure 52 is an application by the defendant (dated 18 July 2001) to set aside an order dated 14 June 1999 for sale of the defendant's land which had been charged to the plaintiff. The application is supported by an affidavit of the defendant sworn on 18 July 2001. The ground of the application as submitted by his counsel is that the said order for sale dated 14 June 1999 is invalid as the counsel who was acting for the plaintiff in the foreclosure proceeding and finally obtained the said order, was the same counsel who had attested both the plaintiff's as well as the defendant's signatures in the relevant Form 16A of the National Land Code relating to the said charge. The defendant's counsel argued that there was an element of conflict of interest.

Factual Background Of The Case
The historical and factual background of the case is that on 1 April 1998, the plaintiff filed an originating summons (*vide* OS No: 24-55-98) for an order for sale of the defendant's land held under H.S.(D) 1287, P.T. 2031, Mukim Kuala Lipis, Daerah Lipis, Pahang which had been charged to the plaintiff, for a loan facility granted by the plaintiff to the defendant. The said land was charged to the plaintiff *vide* "Gadaian bertarikh 22 September 1992, No. Perserahan 6518/92, Jilid: 305, Folio: 26" registered at the Land Office Registry. The defendant defaulted in repayment of the loan facility and accordingly on 17 November 1997 the plaintiff issued a notice to the defendant to make good the default. The defendant failed to comply with the said notice. On 16 February 1998, the plaintiff's counsel, Tetuan Tan Kong Hai & Tui, issued a notice together with Form 16D (NLC) demanding the defendant to settle the whole amount due as at 16 January 1998 for a sum of RM313,728, within 14 days from 16 February 1998 (ie, the date of the notice). Again the defendant failed to comply with the said notice (Form 16D). On 1 April 1998, the plaintiff through the same solicitors, filed an originating summons (encl. 4) for foreclosure proceedings.

The said originating summons (encl. 4) was duly served on the defendant on 18 June 1998 *vide* A.R Registered letter. An affidavit of service was filed (encl. 7). From the A.R Card (exhibited as "IAH1" to encl. 7) the recipient of the documents had received them and had signed the relevant column in the A.R Card. The "Notis Temu Janji (NTJ)" was also served on the defendant by way of personal service on 2 April 1999. The defendant had also signed

an acknowledgment of receipt at the back of the NTJ together with his full name and the date "2 April 1999" handwritten under his signature. The said originating summons came up for hearing before the judge in chambers on 14 June 1998 where from the records of the proceedings (in the court's file) the plaintiff was represented by Puan Kamisah bte Abdul Jalil while the defendant was present in person. On the same day (14 June 1998) the judge made an order as prayed in encl. 4 and fixed a date 20 September 1999 for the auction of the said land. The auction was then postponed to 14 October 1999 *vide* order of the court dated 12 August 1999. Again the auction was postponed to 7 September 2000 *vide* order of the court dated 20 July 2000. The auction was again postponed to 15 January 2001 *vide* order of the court dated 5 December 2000, at the request of the defendant, to enable the defendant to settle the whole amount claimed.

Unfortunately, the defendant has failed to settle the amount claimed. Then the auction was again postponed to 19 July 2001 *vide* order of the court dated 10 May 2001. Just one day before the scheduled auction on 19 July 2001 (ie, on 18 July 2001) the defendant filed the present encl. 52 together with another *ex parte* application (encl. 50) and a certificate of urgency, to the effect that the proposed auction of the said land which was to be held on 19 July 2001, to be deferred until the final disposal of the defendant's application (made *inter partes*) as in encl. 52. The defendant's application was supported by his own affidavit sworn on 18 July 2001 (encl. 51) while the plaintiff's opposition to the said application was supported by an affidavit of one Ti Swee Ling sworn on 10 November 2001 (encl. 63).

Defendant's Affidavit In Support Of The Application (Enclosure 51)

Apparently, the defendant was using the same affidavit (encl. 51) to support his *ex parte* application (encl. 50) as well as the *inter partes* application (encl. 52). In this affidavit, the defendant did not dispute about the loan facility, the charge created and also the fact that he had been in default under the loan agreement.

Suprisingly, in paras. 6 and 8 of the said affidavit, the defendant alleged that the plaintiff has not served any document relating to the cause right from beginning of the proceeding.

Paragraph 6 of the said affidavit says:

> 6. Saya menyatakan bahawa Plaintif tidak pernah menyampaikan sebarang dokumen-dokumen kausa berkaitan dengan tindakan ini dari awal tindakan ini.

Paragraph 8 of the same affidavit says:

> 8. Defendan tidak dapat membawa tindakan ini dengan seberapa segera kerana **pihak Plaintif gagal untuk menyerahkan dokumen-dokumen berkaitan.**

From these two paragraphs, the clear message that the defendant wished to communicate to this court is that he has no knowledge at all about the whole proceedings right from the beginning of the action. I was really surprised to read these two paragraphs (in a sworn affidavit) when I found out in the court file that both the originating summons (encl. 4) as well as the NTJ was duly served on the defendant *vide* affidavits of service as in encl. 7 and encl. 17. The originating summons was served by way of A.R Registered Post where the A.R Card showed that it was received and signed by the defendant; while the NTJ was served personally on the defendant on 2 April 1999 and he had acknowledged receipt by signing at the back of the document. The records of proceedings also shows that on 14 June 1999, when the originating summons came up for hearing before the judge in chamber and order in term of encl. 4 was granted and a date for auction was fixed, the defendant was present in person. Even after the order for sale was made, the defendant has been requesting for postpontment in order to give him more time to settle the amount claimed. The court records also show that the defendant has made a search on the relevant court file (OS No: 24-55-98) on 11 July 2001 ie, one week before he filed his application's in encl. 52, and 50 as well as his affidavit in support in encl. 51. My obvious conclusion is that the defendant is not telling the truth in both paras. 6 and 8 of his affidavit (encl. 51). His conduct in making false statements in a sworn affidavit must be taken seriously by the court. The defendant may be able to squeeze his way through to get postpontments and to drag the time for auction of the said land for more than two years after the order for sale was made on 14 June 1999, but he has to be sincere and come with a clean hand by not making false statements to support his application. What the defendant is doing is very dangerous, not only to himself but also to the administration of justice by the court. The records of the proceeding as found in the court's files are reliable, unless proved otherwise. Both paras. 6 and 8 of the defendant's affidavit relate to issues relevant to support his applications. If the contents of both the paragraphs are not true, then, there is nothing much left to support the defendant's applications. It is not surprising that the counsel for the defendant has not touched anything in those issues in his submissions before this court to support the defendant's application (in encl. 52). On this ground alone, the defendant's application can be dismissed with costs.

The Defendant's Application (Enclosure 52)

The defendant filed the present summons-in-chambers (encl. 52) to obtain an order to set aside the order for sale which was granted by the judge on 14 June 1999. The grounds of the application as contained in paras. 6 and 8 of the defendant's affidavit (encl. 51) is that the plaintiff has failed to serve all the relevant documents relating to the proceedings right from the beginning. However, the defendant's counsel has not touched anything about this grounds

in his submissions. The only ground in his submissions before this court is that the said order for sale (dated 14 June 1999) was invalid on the ground that the counsel or solicitor who represented the plaintiff in that proceedings was the same solicitor who had attested the signatures of both the plaintiff and the defendant in the charge documents (Form 16A) and therefore there was element of 'conflict of interest' involved. However, this issue has not been mentioned at all in the defendant's affidavit in support of the application (encl. 51). The defendant's counsel made very short submissions, only on the above one ground. After a lengthy submission by the plaintiff's counsel, the defendant's counsel chose not to make any reply.

Whether The Court Is *Functus Officio*

In the present case, the relevant originating summons and the "NTJ" were duly served on the defendant. Affidavits of service of both the documents were duly filed. The defendant was present in person on 14 June 1999 when the case was heard before the judge and on the same day the said order for sale was made and the auction date was fixed. The order for sale has been extracted and perfected. The defendant knew about the order as well as the auction date. The auction has been postponed a number of times on various reasons, one of them was at the request of the defendant to enable him to get more time to settle the amount claimed by the plaintiff. (These facts are to be found in the plaintiff's affidavit in reply (encl. 63) which have not been challenged or disputed at all by the defendant). In other words, the said order for sale was not made in the absence of the defendant. There is no indication at all, either from the records of proceedings or other documents filed by the defendant to show that the defendant had raised any objection or dispute the plaintiff's claim during the hearing of the originating summons before the judge on 14 June 1999.

The first issue to be decided in this case is on the revocability by another judge subsequently of an order made by an earlier judge and since perfected.

It is settled law, that an order of sale of charged land was a final order unless appealed against and once it was made, drawn up and perfected, the judge was *functus officio* and therefore had no power to set aside the order of sale. (Decision of the Supreme Court in *Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming – Intervener)* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222. This decision was followed by the Supreme Court in another case: *Scotch Leasing Sdn. Bhd., (In receivership) v. Chee Pok Choy & Ors.* [1997] 2 CLJ 58. In another case: *Hock Hua Bank Berhad v. Sahari bin Murid* [1981] 1 MLJ 143 the Federal Court has also ruled that:

> the Court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing.

In *Badiaddin bin Mohd. Mahidin & Anor v. Arab-Malaysian Finance Bhd.* [1998] 2 CLJ 75, Mohd Azmi FCJ has also ruled that:

> It is settled law that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction.

In the same case (*Badiaddin*'s case) Peh Swee Chin FCJ made the following observation:

> When a judgment in the High Court has been perfected, a party to a judgment generally, apart from any appeal, cannot reopen the matter finalised in the judgment by seeking to alter it or amend it for the Court would be *functus officio* by virtue of the ratio of *Hock Hua Bank Bhd. v. Sahari bin Murid.* Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior court of unlimited jurisdiction in the course of contentious litigation.

In the present case, the order for sale has been made, drawn up, extracted and accordingly perfected. It was also made in the presence of both parties, ie, the plaintiff as well as the defendant. It was not made by default or in the absence of the defendant. There is also no indication from the defendant that the court when granting the said order on 14 June 1999 lacked jurisdiction to do so. On the strength of all the above authorities cited, the only issue left to be determined is whether the said order could be proved to be null and void on ground of illegality.

If the order was made based on illegality then it can be set aside and the doctrine of *functus officio* as laid down by the above authorities will not apply. Otherwise, if there is no element of illegality involved in granting the said order, then the said order cannot be set aside as the court is *functus officio*.

Order For Sale Under Section 256(3) Of The National Land Code (NLC)

The said order for sale was made under s. 256(3) of the NLC. In *Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 the Privy Council held that s. 25(3) of the NLC is mandatory, in the sense that the court "shall" order the sale unless it is satisfied of the existence of any "cause to the contrary". The court can only refuse an order for sale of the charged property only if it is satisfied of the existence of any "cause to the contrary".

In *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36 the Supreme Court held:

> A Chargor may show cause to the contrary under section 256(3) of the Code:
>
> (i) by demonstrating that the charge is defeasible upon one or more of the grounds specified under subsection (2) and (4)(b) of section 256;
>
> (ii) by demonstrating that the chargee has failed to meet the condition and precedent for the making of an application for an order for sale, such as failure to make a demand or service of a notice in Form 16D, or that the notice of demand's sum not lawfully due from the charge;
>
> (iii) by demonstrating that it grant would be contrary to some rule of law of equity.

In the present case, there is nothing raised by the defendant, either in his affidavit in support (encl. 51) or his counsel's submissions to show that a "cause to the contrary" has been established. The only issue raised by the defendant in his counsel's submission (but not in his affidavit in support) is that the solicitors Tetuan Tan Kong Hai & Tui who was acting for the plaintiff in the said originating summons to obtain the said order for sale, was the same solicitors who had attested the signature of the plaintiff and the defendant in the charge documents Form 16A NLC; and as such it involved element of conflict of interest. Therefore, it is to examine whether the so-called 'conflict of interest' as alleged by the defendant's counsel in his submissions is sufficient to raise a 'cause to the contrary' and to set aside the said order for sale made on 14 June 1999.

Whether There Is Any Element Of Conflict Of Interest On Part Of The Solicitors For The Plaintiff

The defendant's counsel did not elaborate as to how or in what way the alleged conflict of interest arises. He just mentioned that by attesting the signatures of both the chargor and the chargee in Form 16A NLC, and later acted for the plaintiff (the chargee) in the said originating summons, there was an element of 'conflict of interest' created. He cited the case of *Sykt. Pengangkutan Sakti Sdn. Bhd. v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754 to support his argument. In that case, the plaintiff engaged an advocate and solicitor, Mr. Gana Muthusamy for the purpose of getting back his motorvan from the defendant's workshop when the latter had refused to return unless the plaintiff settled the sum of RM1,267. On the basis of that retainer, Mr. Muthusamy proceeded to the defendant's workshop accompanied by a representative from the plaintiffs company. At the defendant's workshop, Mr. Muthusamy spoke to one Tan Joo Khing and tried to persuade him to release the motorvan with an undertaking by the plaintiff to settle all charges

payable to the workshop but without prejudice to the right of the plaintiff to litigate the matter in a court of law. However, the attempt by the counsel failed. Subsequently, the law firm of Messrs. Gana Muthusamy & Co., served on the defendant a writ of summons indorsed with a statement of claim and a summons in chambers with two affidavits. At the hearing of the summons in chambers, counsel for the defendant raised a preliminary objection to the effect that the law firm of Messrs. Gana Muthusamy & Co., should not appear on record as solicitors for the plaintiff since Mr. Muthusamy would be called as a witness. Abdul Malik Ishak J ruled that to allow the plaintiff's counsel or his legal assistant to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of clear words in s. 94(3)(n) and (o) of the Legal Profession Act 1976. The judge also ruled that the law firm of Messrs. Gana Muthusamy & Co., would equally be infected and should not remain on record as solicitors for the plaintiff for the simple reason that Mr. Muthusamy owned the firm. The judge went on to say:

> When Mr. Muthusamy visited the Defendant's workshop and spoke to Tan Joo Khing, he became a witness on material and disputed questions of fact. By virtue of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr. Muthusamy should be barred from representing the Plaintiff, be it in open court or in chambers as he should not be allowed to be a witness for the Defendant and counsel for the Plaintiff at the same time.

The fact or the allegation of conflict of interest by the defendant's counsel in the present case is far different from the fact of the above case cited *(Sykt. Pengangkutan Sakti Sdn. Bhd.)*. In that case, the solicitor in question played an active role in demanding for the motorvan to be returned. As such he would likely be called as a witness either by the plaintiff or the defendant. While in the present case, the said solicitor, Tetuan Tan Kong Hai & Tui was only involved in attestation of the chargor's and chargee's signatures in Form 16A NLC, nothing more. There is no possibility at all that the said solicitor will be called as witness by either party in the proceeding. There is no indication at all that the defendant would dispute the legality or validity of the charged document in Form 16A NLC. Even during the hearing of the said originating summons before the judge on 14 June 1999 where the defendant appeared in person, there was no indication that the defendant had raised anything to challenge the validity of the said Form 16A NLC. Infact, in his affidavit in support of his application (encl. 51) the defendant clearly admitted and did not dispute about the loan granted by the plaintiff; the charge document and the fact that he had defaulted in repayment of the loan. Nothing to indicate that he would challenge the validity of the charge document. Therefore, it is obvious in this case, that there was no possibility at all that the said solicitor may be called as a witness in the proceedings.

If at all the same solicitor need to be called as a witness in the proceedings, he may do so provided his testimony would be limited to the attestation of the charge document. Form 16A or in cases where the testimony involves no material and disputed question of fact.

In *Lee Kam Sun v. Ho Say Lin & Anor* [1999] 4 CLJ 507, James Fong J has ruled that:

> It is a well established principle that lawyers should not act as counsel and witness in the same proceeding. This rule however does not apply if the testimony of the advocate and solicitor so acting relates to matters which are formal and non-contentious such as identification, attestation, custody of documents and the like. In the instant case, had the issue of the case been merely confined to the interpretation of the terms of the agreement, then section 92 of the Evidence Act 1950 would have applied and no oral evidence would be admitted to contradict, vary add to or substract from it. In such a situation, any testimony of CTS (the counsel) would be limited to the attestation of the agreement and this fall within the exceptions of the rule on the conflict of interest in acting for the Plaintiff.

Infact the rules relating to conduct and etiquette in the legal profession as found in r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, only prohibits such advocate and solicitor from appearing in respect of a 'material and disputed question of fact'. The said rule clearly say that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact. The rule lays emphasis on the words "a material and disputed question of fact." In *Wee Choo Keong v. Pendakwa Raya* [1990] 1 CLJ 1015; [1990] 3 CLJ (Rep) 346, Wan Yahya J (as he then was) has expressed his view on r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978 when he said:

> This section to my mind does not envisage that an advocate and solicitor is *ipso facto* excluded from appearing as such in court the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.

Applying the above principles to the fact of the present case, I am convinced that there is nothing to stop the said solicitor Tetuan Tan Kong Hai & Tui from acting as solicitor for the plaintiff in the said originating summons in applying for an order for sale of the defendant's land eventhough the same solicitor has witnessed the attestation of Form 16A NLC by the plaintiff and the defendant. There is no question of conflict of interest. The counsel has

no personal or pecuniary interest in the attestation of Form 16A NLC. There is also no indication in the present case to show the said solicitor would be embarrassed by acting for the plaintiff in the proceedings. Also there is no indication to show that the solicitor was having some personal relationship with any of the parties or a witness in the proceedings.

If at all the said solicitor is said to be in breach of any of the rules in the Legal Profession (Practice and Etiquette) Rules 1978, the only effect of the breach is in relation to discipline. It is not sufficient to render the proceedings illegal or any order made thereunder a nullity. In *Asia Commercial Finance (M) Bhd. v. Bank Bumiputera Malaysia Berhad & Ors.* [1988] 1 MLJ 33, Zakaria Yatim J (as he then was) has said:

> In my opinion, the Practice and Etiquette Rules 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The rules do not regulate the procedure of legal proceedings in the High Court.

In the above premise, I have no hesitation to hold that the defendant has not establish any 'cause to the contrary' for the purpose of s. 256(3) of the NLC. Therefore, the order made on 14 June 1999 is perfectly good in law and cannot be set aside. The principle of *functus officio* as laid down in the above cited authorities is applicable.

Inordinate Delay In Filing The Application

The plaintiff's counsel has also raised the issue about inordinate delay on part of the defendant in bringing this application to set aside the said order for sale which was granted in his presence more than two years before the date of the application. In para. 8 of his affidavit in support (encl. 51) the defendant said that:

> Defendant tidak dapat membawa tindakan ini dengan seberapa segera kerana pihak plaintiff gagal untuk menyampaikan dokumen-dokumen berkaitan.

I have said earlier that I cannot believe this reasoning. There were evidence to show that all the necessary documentation, particularly the said originating summons and the NTJ were duly served on the defendant. The defendant was also present in court on 14 June 1999 when the case came up for hearing and the judge made the order. The auction had been postponed for five times on various reasons; one of them was on the request of the defendant to enable him to get more time to settle the amount claimed. He filed his applications (encls. 52 and 51) together with a certificate of urgency just one day before the auction date (19 July 2001) after not being able to settle the amount claimed. This is a clear case of inordinate delay on the part of the defendant. It is also a clear case of an abuse of the court process and obviously, the

court cannot and should not condon this conduct of the defendant. The application was made *mala fide* with the intention to drag the execution process to the fullest and to deprive the plaintiff the fruits of the order duly made in accordance with law.

Conclusion

On the above considerations, I have no other alternative than to hold that there is no merit in the defendant's application as in encl. 52. Therefore the defendant's application is dismissed with costs.